Supreme Court, U.S.
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No. 98-183

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

LANDGATE, INC.,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where an agency reasonably but erroneously believed that a lot proposed for development had been created illegally without an agency permit, whether the delay in use resulting from judicial clarification of the lot's legality constituted a "temporary" taking of property for which damages are available under the Federal Constitution.

PARTIES BELOW

Landgate, Inc. is the only petitioner before this Court. Peter Bogart and Punty Bogart, who alleged below that they possessed a life estate in the property during the period of the alleged temporary taking and who were parties in the proceedings before the California trial and appellate courts, did not join the petition. See pp. 7-9 *infra*.

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Uelmen, *Playing Center*, California Lawyer, July 1998 at 45 19

The California Coastal Commission respectfully requests that this Court deny the petition for a writ of certiorari.

JURISDICTION

The Court lacks jurisdiction because the petitioner Landgate, Inc. ("Landgate"), does not have standing to petition for a writ of certiorari. Landgate asserts only a remainder interest in the property alleged to have been taken. The owners of the life estate, Peter and Punty Bogart, alone have standing to pursue a claim for temporary takings damages, and they did not join the petition. See pp. 7-9 *infra*.

STATEMENT

A. Introduction

Throughout this litigation Landgate has assumed that every mistake made by a land use agency which delays the development of vacant property constitutes a compensable temporary "taking." Yet this Court has established that there is a wide range of government actions that "deny" or delay the use of property but which do not necessarily constitute takings. For example, the imposition of a permit system does not constitute a taking, even though it prohibits the development of property until the landowner complies with the permitting process. *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-127 (1985). The observation, then, that a particular government action prevents the use of property marks the beginning of the takings analysis, not the end of it.

Far from representing any departure from this Court's regulatory takings doctrine, the California Supreme Court's decision in this case applied a principle that was previously recognized by this Court in *First English Evangelical Lutheran Church* v. *Los Angeles County*, 482 U.S. 304 (1987) ("*First English*"): "normal delay" in the permit process does not constitute a regulatory taking. This principle is compelled by *Riverside Bayview Homes*; if the imposition of a permit requirement itself is not a taking, neither is the delay

associated with seeing that process to its completion.

The California Supreme Court here applied the principle of normal permit delay to a discrete set of facts. Among other grounds, the Commission, relying on the advice of its legal counsel, denied Landgate's application on the ground that the lot on which Landgate proposed to build was illegal because its boundaries had been reconfigured without a coastal permit. The state court of appeal determined that the Commission incorrectly asserted permit jurisdiction over the lot line reconfiguration and that the reconfigured lot was legal. With the issue of the lot's legality now resolved, the Commission for the first time was in a position to make a final use determination, and it promptly approved the project with mitigating conditions. The delay encountered by Landgate during resolution of the lot's legality was not a taking.

Landgate admits that *First English* recognized the difference between temporary takings and noncompensable permit delay. Landgate Pet. at 13. In order to elevate the California Supreme Court's unexceptional application of the normal permit delay principle into a reviewable issue, Landgate contends that the principle of normal delay does not apply where an agency makes a mistake during the decisionmaking process and development is postponed while courts review the agency's action. But neither *First English* nor *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), the two cases upon which Landgate places the most reliance, ever suggested that the principle of normal permit delay was inapplicable where the delay was partly attributable to judicial review of an agency's interim permit error.

Moreover, there is no conflict among lower court decisions on this issue. Federal and state courts throughout the country have uniformly recognized that delay caused by government mistakes over preliminary land use issues, such as the scope of an agency's permit jurisdiction, are an inherent part of the permit process. These normal delays do not constitute takings even though the error postponed development and even though judicial intervention was necessary to correct it. See pp. 10-

11 *infra*. The California Supreme Court properly concluded that the delay experienced by Landgate while the legality of its lot was litigated was not a compensable taking.

Finally, Landgate ignores the extraordinary implications of its argument. According to Landgate, any delay caused by a government mistake in the permitting process is a per se taking, without regard to the nature of the disputed regulatory issue, the impact of the government's action on the value of the property, or the expectations of the landowner. For example, if an agency denied a project because an applicant failed to provide a geological report required by the agency, and a court later determined that the report was not required, the delay in use caused by litigation over the necessity of the report would, in Landgate's view, constitute a compensable taking. Landgate seeks, in other words, to convert the takings clause into a tort claims statute that would hold government strictly liable for any delay in use caused by a government error in the permit process. No reasonable reading of this Court's takings jurisprudence could ever justify such a result. "[I]t is well-established that 'not every destruction or injury to property by governmental action has been held to be a "taking" in the constitutional sense.'" *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 82 (1980), quoting *Armstrong* v. *United States*, 364 U.S. 40, 48 (1960).

Landgate's petition for a writ of certiorari should be denied.

B. Facts

This land use dispute involves property in Malibu, California that is located in a scenic area of the Santa Monica Mountains known as Escondido Canyon. 11 CT (Clerk's Transcript) 2637. Prior to the lot line adjustment in question, there existed two narrow two-acre lots running in a north-south direction. 5 CT 1193; see 12 CT 2863, 2881. Landgate's predecessor constructed a single-family dwelling on the flat, southerly portion of one of the lots. 5 CT 1194.

After constructing a two-lane road that bisected the two

narrow lots, the County of Los Angeles approved a lot line adjustment that reconfigured the two lots into a single sloped lot north of the road and a single flat lot (containing the existing home) south of the road. 2 CT 313; see 12 CT 2863, 2881. On October 12, 1990 Landgate purchased the northern, sloped lot. 5 CT 1194. Peter and Punty Bogart acquired a life estate in this property from Landgate, which held the remainder interest. 8 CT 1836; see pp. 7-9 *infra*.

In October 1990 Landgate submitted to the Commission a coastal development permit application to deposit 8,500 cubic yards of fill and to construct a 9,036 square-foot single-family residence, swimming pool, septic system and retaining walls. 12 CT 2862, 2863. Landgate later reduced the amount of fill from 8,500 to 4,300 cubic yards and reduced the size of the house to 7,500 square feet. 12 CT 2862-2864.

In processing the application, the Commission's staff became aware that a coastal development permit had not been obtained for the lot line adjustment and reported this deficiency in its staff report. 11 CT 2638. After a public hearing, the Commission denied Landgate's permit application on three grounds. First, the Commission found that the project's massive grading violated the grading and landform alteration policies of both the Coastal Act and the Malibu Land Use Plan (LUP) that was adopted as part of the County's local coastal program, see Cal.Pub.Resources Code, §§ 30500-526. 12 CT 2866. Second, it determined that the proposed residence was not sited and designed to protect scenic views and was contrary to the visual resource policies of both the Act and the Malibu LUP. 12 CT 2888. Among other concerns, the height of the house was nine feet greater than the standard contained in the Malibu LUP. 12 CT 2866, 2868, 2901. Finally, acting under advice of its legal counsel and an earlier opinion of the California Attorney General, 12 CT 2869-70, the Commission asserted permit jurisdiction over the 1989 lot line adjustment and found that the lot line adjustment did not conform with Coastal Act policies. *Id.*

Landgate filed a petition for a writ of mandate and a

complaint seeking declaratory relief and damages for an alleged taking and a denial of civil rights. 1 CT 1. The petition for a writ of mandate was severed, with the takings issues being reserved for later adjudication. 1 CT 120, 130. The trial court issued the writ, finding that the Commission did not have permit jurisdiction over this particular lot line reconfiguration and that the Commission should reevaluate the project as if the lot reconfiguration were legal. Pet.App. at 104a-105a. The trial court did not address the validity of the other grounds for the permit denial. Limiting its decision to the "peculiar facts" of the case, the court of appeal affirmed in an unpublished decision. Pet.App. at 91a, 98a. It directed the Commission to treat the lot as legal but stressed that "the Commission retains its ability to regulate and approve any proposed building on the lot." Pet.App. at 98a.

In February 1993 the Commission reconsidered Landgate's project. By now Landgate had modified the project by reducing grading to 2,893 cubic square yards, by reducing height to 35 feet above existing grade, and by reducing the fill slope. 1 CT 193, 195. The Commission approved the revised project with additional conditions to further minimize project impacts. 1 CT 190-192. Landgate did not challenge the conditional approval. 1 CT 214.[1]

Returning to the trial court, Landgate moved for summary adjudication of its takings claim. 2 CT 268. It contended that the Commission's erroneous assertion of permit jurisdiction over the lot line reconfiguration had prevented it from using its property and constituted a temporary taking. 2 CT 258-266, 288-292. The trial court granted Landgate's motion, Pet.App. at 101a, and denied the Commission's concurrent motion for summary judgment. 4 CT 846.

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1. There is no evidence anywhere in the record to support Landgate's statement, Landgate Pet. at 4, that it was unable to build its house because it expended construction funds on litigation.

The Commission moved to dismiss the action on the ground that Landgate, as the remainderman, had no standing to pursue a temporary taking claim. 5 CT 1097. Landgate then amended its complaint to name the Bogarts as plaintiffs. 5 CT 1104. After a bench trial on damages, the trial court awarded Landgate and the Bogarts temporary taking damages of $155,657, plus costs and attorney fees. Both sides appealed.

The court of appeal affirmed the trial court's determination that the Commission had engaged in a taking. Pet.App. at 55a. The court of appeal rejected the Commission's argument that the delay caused by its erroneous assertion of permit jurisdiction over this particular lot line adjustment was a noncompensable mistake in the permitting process: "Nothing in the record suggests that the lot line adjustment issue arose out of anything other than the Commission's ongoing jurisdictional spat with the County of Los Angeles combined with a desire to prevent Landgate from building on its parcel . . . . " *Id.* at 71a.

The California Supreme Court granted the Commission's petition for review and reversed. The Court found that the case "falls squarely into the category of a normal delay" that was identified in *First English.* Pet.App. at 2a. The legality of the lot on which Landgate proposed to build was a "threshold" issue in the permitting process, and the Commission could not issue a final decision until the legality of the lot was resolved. Pet.App. at 32a. Courts are frequently called upon in the permitting process to resolve these types of interim regulatory disputes, and the Court found that nothing in *First English* contradicted its conclusion that a judicial determination of the validity of certain "preconditions to development" is a normal part of the development process. Pet.App. 32a-33a. And, unlike *Lucas*, which involved a final statutory development ban that rendered property valueless, this case involved a delay in permit processing caused by a jurisdictional dispute that prevented the Commission from issuing a final decision. Pet.App. at 27a-32a. Finally, the Court admonished that agencies may not delay permit

decisions for pretextual reasons. It found, however, that the Commission's erroneous assertion of permit jurisdiction in this case was neither unreasonable nor a pretext to deny all use. Pet.App. at 24a-25a, 31a.

Justice Chin dissented, based on his view that the Commission "opposed all development of Landgate's property regardless of the magnitude of the development," Pet.App. at 37a, a factual characterization with which the majority disagreed.

Justice Brown also filed a dissent. Justice Brown criticized this Court's *ad hoc* test in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 123-125 (1978) as "squishy" and so "amorphous that it is capable of producing virtually any result." Pet.App. at 44a. She stated that the majority reverted to *Penn Central* at every opportunity and ignored *Lucas's* categorical formulation, which, Justice Brown asserted, overruled pro tanto *Penn Central's* "regulatory friendly" formulation. Pet.App. at 44a, 51a. Apparently assuming that the delay in use caused by the Commission's erroneous assertion of permit jurisdiction necessarily constituted a final decision denying all economically viable use of property, Justice Brown contended that the case met the *Lucas* categorical formulation.

REASONS WHY THE PETITION SHOULD BE DENIED

I. LANDGATE, WITH ONLY A REMAINDER INTEREST, DOES NOT HAVE STANDING BECAUSE ONLY THE LIFE TENANTS HAVE A CLAIM FOR TEMPORARY TAKING DAMAGES

Landgate was the sole plaintiff in the original complaint filed in this case. 1 CT 1. The Commission moved to dismiss the action on the ground that Landgate, as the remainderman, had no standing to pursue a taking claim because damages for a temporary taking would accrue solely to the life tenants, Peter and Punty Bogart. 5 CT 1097. In response to this

motion, Landgate successfully moved to amend its complaint to include the Bogarts as plaintiffs. 5 CT 1104. The verified amended complaint stated that the Bogarts owned a life estate in the property and that Landgate is "owned and controlled" by the Bogarts. 5 CT 1191. In his deposition, however, Peter Bogart testified under oath that he and his wife held no shares in Landgate and did not control it. 8 CT 1828-1838. During the damages phase of trial, the trial court referred to the Bogart-Landgate relationship as a "sham" and as having an "odor about it." RT 226.

The judgment jointly awarded damages to Landgate and the Bogarts. 9 CT 2059. Landgate and the Bogarts each cross-appealed the judgment, 10 CT 2456, and both were named as respondents in the Commission's petition for review in the California Supreme Court. Only Landgate, however, has petitioned for review in this Court. This omission is fatal to Landgate's petition because Landgate, as remainderman, has no standing to seek temporary takings damages.

Although there is no set formula for awarding temporary takings damages, see *Corrigan* v. *Scottsdale*, 720 P.2d 513, 518-519 (Ariz.), *cert. denied*, 479 U.S. 986 (1986), damages are ordinarily calculated on the basis of lost use or lost profits during the period of the taking. See, e.g., *Kimball Laundry Co.* v. *United States*, 338 U.S. 1 (1949); *Wheeler* v. *City of Pleasant Grove*, 833 F.2d 267 (11th Cir. 1987). Under California law, a life tenant has the exclusive right to recover lost rents during the period of the life estate. See Cal.Civil Code, § 818; *Horstmann* v. *Sheldon*, 202 Cal.App.2d 184, 20 Cal.Rptr. 735, 740 (1962); see also 51 Am.Jur.2d, Life Tenants, § 130. In the only discovered reported decision that has addressed the specific issue, the Federal Court of Claims ruled that the life tenant alone had a right to pursue temporary takings damages arising during the period of the life estate. See *In re Riggleman*, 215 Ct.Cl. 865 (1977). Landgate therefore has no standing to assert a claim for temporary taking damages that belongs solely to the life tenant.

Moreover, Landgate is in no position to disagree with this

statement of California law. Once Landgate amended its complaint to join the Bogarts, the Commission had no reason to pursue the standing issue before the California appellate courts. By waiting until now to revive this issue, Landgate prevented the California appellate courts from deciding whether, as a matter of California law, the holder of a remainder interest has a cognizable property interest in temporary takings damages. Landgate's tactic also prevented the California courts from resolving any factual issues regarding the Landgate-Bogart relationship. Landgate's circumvention of the California courts precludes review in this Court. See, e.g, *Adams* v. *Robertson*, 520 U.S. 83 (1997).

For these reasons alone, Landgate's petition for a writ of certiorari should be denied.[2]

II. THE CALIFORNIA SUPREME COURT'S DECISION CORRECTLY APPLIED EXISTING TAKING DOCTRINE AND IS NOT IN CONFLICT WITH THE RULINGS OF THIS COURT OR LOWER COURTS

A. The California Permit Process Includes Both an Administrative Process and an Expedited Judicial Review Process

The "California permit process includes both administrative and judicial review of any conditions to which the landowner objects." *Hensler* v. *City of Glendale*, 8 Cal.4th 1, 17, 32 Cal.Rptr.2d 244, 255, 876 P.2d 1043, 1054 (1994), *cert.denied*, 513 U.S. 1184 (1995). This integrated

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2. Landgate does not mention the Bogarts by name once in its 30-page petition. It may be inferred that Landgate made a tactical decision to avoid any association with Peter Bogart. See *Ojavan Investors, Inc.* v. *California Coastal Commission*, 54 Cal.App.4th 373, 62 Cal.Rptr.2d 803), *cert. denied*, __ U.S. __, 118 S.Ct. 601, 139 L.Ed. 886 (1997) (affirming award of over $9.5 million in civil penalties against Bogart and Bogart-owned entities for illegal land sales in violation of the Coastal Act).

administrative/judicial process is an expeditious one, especially where the Coastal Act is involved. A public hearing must be held within 49 days after an application is accepted for filing, Cal.Pub.Resources Code, § 30621, and the Commission must act upon an application within 21 days after the hearing is closed, *id.* 30622. Any person seeking review of a Commission decision must file a petition for writ of administrative mandate under California Code of Civil Procedure section 1094.5 within 60 days after the decision. Cal.Pub.Resources Code, § 30801. Administrative mandate proceedings may be heard on a law and motion calendar once the administrative record is prepared. See Cal.Code Civ.Proc., § 1094.

B. The California Supreme Court Correctly Applied the Principle That Normal Delay in the Permit Process Is Noncompensable

The California Supreme Court found that the Commission could not make its final determination of use until the legality of the lot on which Landgate proposed to build was resolved. Although the Commission's erroneous assertion of permit jurisdiction over the lot line reconfiguration may have delayed development, the delay caused by judicial resolution of the lot's legality was a "normal delay" in the permitting process and not a temporary taking for which *First English* required compensation. In reaching this conclusion, the California Supreme Court did not create a new legal principle. This Court itself in *First English* recognized that "quite different questions . . . would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like" than those presented by the outright development ban alleged in *First English*. *First English*, 484 U.S at 321. The conclusion that temporary hardships during the permit process are noncompensable is compelled by *Riverside Bayview Homes*—if the imposition of a permit requirement is not a taking, neither is the normal delay that

often occurs during the decisionmaking process.

The California Supreme Court correctly determined that the delay in approving the Landgate application was normal permit delay within the contemplation of *First English*. The Commission faced a threshold boundary line question: were the boundaries of the Landgate property those that existed before or after the lot line reconfiguration? The Commission could not make an informed decision—it could not make a *final* decision—about where and how the proposed development could be sited until it knew the location of the boundaries of the lot. This is the kind of complex question that often arises when agencies are confronted with interpreting statutes and policies, see, e.g., Pet.App. at 33a-35a, and the permit process in this case had to be delayed because only a court could provide a definitive legal answer about the lot's legality. Once the court of appeal determined that the Commission could not require a permit for the lot reconfiguration and that it must recognize the new boundaries, the Commission was able to make a final use determination. In these circumstances the California Supreme Court properly characterized the delay encountered by Landgate during the judicial resolution of the lot's legality as one of those temporary hardships inherent in a permitting process and not the categorical denial of all use.

The California Supreme Court's analysis is consistent with that of courts throughout the country that have been confronted with similar issues. The lower courts uniformly have agreed that the delay encountered during the permit process is noncompensable, even when delay is caused by an agency error during the permitting process and even when judicial intervention is necessary to correct the mistake. E.g., *Tabb Lakes, Ltd.* v. *United States*, 10 F.3d 796, 800-803 (Fed.Cir.1993) (no taking even though Corps' erroneous assertion of jurisdiction "effectively stopped [the plaintiff's] development" of property until courts corrected the mistake); *Jacobi* v. *City of Miami Beach*, 678 So.2d 1365 (Fla.Pet.App. 1996) (no taking or due process violation where land use agency

improperly denied a landowner's application to reconfigure two lots even though judicial intervention was required to correct the error); *Smith* v. *Town of Wolfeboro*, 615 A.2d 1252, 1257 (N.H. 1992) (erroneous denial of permit based on agency's misunderstanding of lot's legality not a taking, finding that judicial correction of errors is part of the decisionmaking process); *Cannone* v. *Noey*, 867 P.2d 797 (Alaska 1994) (delay caused by erroneous rejection of wastewater treatment plans not a taking, even though judicial intervention required to correct error); *Steinbergh* v. *City of Cambridge*, 604 N.E.2d 1269, 1275 (Mass.1992), *cert. denied*, 508 U.S. 909 (1993) (no taking despite delay caused by judicial review of mistaken legal interpretation); *Lujan Home Builders, Inc.* v. *Orangetown*, 568 N.Y.S.2d 850, 851 (N.Y.Sup.1991) (no taking despite erroneous decision because "delay in securing judicial relief" was part of the decisionmaking process).

The California Supreme Court correctly determined that the delay resulting from judicial resolution of the legality of the Landgate lot was part of the normal delay inherent in a permitting process and not a final definitive decision that categorically denied the use of property.

C. The California Supreme Court's Decision Does Not Conflict With the Decisions of This Court or the Lower Courts

The California Supreme Court's conclusion that normal permit delay may include judicial review of an agency's resolution of preliminary permit issues is not in conflict with either the decisions of this Court or those of the lower courts.

1. There Is No Conflict With the Decisions of the Lower Courts

The *Landgate* decision does not conflict with the decisions of other lower courts. Federal and state courts throughout the country have agreed that normal permit delay is noncompensable, even when the agency has erred in its

resolution of a preliminary issue and even when judicial review is required to correct it. See pp. 11-12 *supra*. Landgate does not cite a single lower court authority to support its view that the normal permit process may never include judicial review of preliminary permit issues. Nor does Landgate cite a single lower court authority that supports its view that the delay in use caused by an agency's interim mistake during the permit process constitutes a per se taking. Finally, Landgate does not cite a single authority that found a taking on a remotely similar set of facts.[3]

2. There Is No Conflict With the Decisions of This Court.

Landgate asserts that the *Landgate* decision conflicts with *First English* because the *Landgate* decision treats judicial resolution of preliminary permit issues as part of the normal permit process. *First English* recognized the difference between normal permit delays and actual regulatory takings, see pp. 10-11 *supra*, and did not hold or imply that normal permit delay may not include judicial review of interim permit decisions. Landgate concedes as much when it states that *First English* "did not attempt to define the phrase 'normal delays.'" Landgate Pet. at 13. The California Supreme Court's application of the normal permit delay principle

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3. Landgate relegates to a footnote its suggestion that "these questions have divided the lower courts." Landgate Pet. at 9, n. 7. Of the two cases cited by Landgate in which a taking was found, neither *City of Petersburg* v. *Bowen*, 675 So.2d 626 (Fla. 1996), nor *Steel* v. *Cape Corporation*, 677 A.2d 634 (Md. Ct. Spec. App. 1996), involved the issue whether permit delay caused by an interim land use error requiring judicial review constitutes a temporary taking. The taking discussion in a California court of appeal decision, *Healing* v. *California Coastal Commission*, 22 Cal.App.4th 1158, 27 Cal.Rptr.2d 758 (1994), was dicta because the case involved the procedure for litigating takings claims and, if inconsistent, must yield to the California Supreme Court's decision in *Landgate*.

therefore did not conflict with *First English*.

Landgate also asserts that the California Supreme Court's decision conflicts with *First English* because it denies compensation where there has been a temporary taking. Landgate Pet. at 14-16. *First English*, however, only provides that, *if* there has been a taking, government must pay compensation between the time of the taking and the time that the offending regulation is rescinded. Because there was no taking in this case, the *First English* compensation rule never comes into play. Pet.App. at 25a-35a.[4]

Nor does the California Supreme Court's decision "vitiate" *Lucas*, as Landgate argues. Landgate Pet. at 16-17. Landgate's argument is based on the faulty assumption that any delay in use of vacant property resulting from government error during the permitting process necessarily equates to a categorical denial of use under *Lucas*. *Lucas* understood that the situations in which government truly denies all economically viable use are "relatively rare" and "extraordinary," see *id.* at pp. 1016-1017; they involve situations where an agency—at the end of the regulatory process—makes an ultimate determination of use decision that precludes use and renders property "valueless." *Lucas* never suggested, much less held, that every delay in the use of vacant property caused by an agency mistake during the permit process constitutes the categorical taking of property.

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4. Landgate argues that the California Supreme Court erred because, in Landgate's view, it adopted the dissenting opinion of Justice Stevens in *First English*. Landgate Pet. at 21-24. The California Supreme Court did not adopt Justice Stevens' dissent in *First English*; California Supreme Court accepted the majority view in *First English* that true temporary takings are compensable. Pet.App. at 13a. As to the much narrower issue involved here—whether delay during permit processing might constitute a taking—the Court in *First English* did not decide in what circumstances permit delay might constitute a taking and therefore did not address Justice Stevens' concern about the possible overbreadth of the majority decision.

Pet.App. at 27a-32a.

This case differs from *Lucas* in another important respect. In *Lucas* the South Carolina courts found that the taking claim was ripe and the State conceded that the property was valueless as a result of governmental action. *Lucas,* 505 U.S. at 1011, 1020, fn. 9. In contrast, the California Supreme Court found as a factual matter that the Commission's decision was not final and that the Commission contemplated some use on the property. Pet.App. at 28a-30a. In addition, the Commission has always disputed Landgate's claim that the regulatory delay constituted the denial of economically viable use of property. See pp. 16-17 *infra.* The Court in *Lucas* indicated that it would have accepted a finding of the South Carolina's Supreme Court that the case was not ripe for review, *Lucas*, 505 U.S. at 1011, and the Commission requests here that the Court honor the California Supreme Court's finding that the Commission's decision was not a final determination of use.

Landgate also contends that the California Supreme Court's decision conflicts with *Williamson County Regional Planning Commission* v. *Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). Landgate Pet. at 24-26. Landgate's resort to *Williamson County* is self-defeating. In *Williamson County* the Court found that, after a seven-year regulatory process, the plaintiff's taking claim still was not ripe because the plaintiff had yet not obtained a "final, definitive position" on what use might be made of the property. *Williamson County* recognizes that, as in this case, agencies often "deny" or delay development in the course of the regulatory process without reaching a truly "final" decision. Indeed, *Williamson County* recognizes that, except in the rarest cases, a taking claimant must make two or more applications before an agency can provide its final view on a proposed use. See also *MacDonald, Sommer and Frates v. County of Yolo*, 477 U.S. 340, 348 (1986).

In this case the California Supreme Court properly determined that the Commission had not and could not make

a final, definitive determination of use until the courts had established the legality of the lot on which Landgate proposed to build. Landgate's finality argument reduces to little more than a disagreement with the California Supreme Court's fact-specific finding that the Commission's decision was not a final determination of use. That kind of disagreement does not merit this Court's review. See *Lucas*, 505 U.S. at 1011.

In summary, the California Supreme Court's rejection of Landgate's taking claim does not conflict with the decisions of this Court or the lower courts.[5]

D. None of the Other Reasons Offered by Landgate Has Merit

Landgate offers a number of miscellaneous reasons why the Court should accept this case. None are meritorious.

First, Landgate asserts that "there is no dispute that the Commission's erroneous decision denied it 'all economically beneficial or productive use'" of its property. E.g, Landgate Pet. at 27. This assertion is grossly in error. It is based on Landgate's flawed assumption that every delay in use during the permit process equates to the categorical denial of all economically viable use, and the Commission has always disputed that its actions effected a categorical taking. Moreover, Landgate did not raise this as a factual issue in its separate statement of undisputed material facts that it filed with its summary adjudication motion, nor did it present any evidence with its motion that the Commission's action prevented the use or affected the value of the property. 3 CT

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5. The Commission's amici curiae argued before the California Supreme Court that there was a separate basis for rejecting the taking claim. There is no taking where the agency has no authority to perform the act on which the taking claim is based, such as the Commission's erroneous assertion of permit jurisdiction. See, e.g., *Regional Rail Reorganization Cases*, 419 U.S. 102, 127, n. 16 (1974); *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U.S. 327, 330 (1922).

512. California summary judgment law prohibits consideration of factual issues and evidence that were not identified in a party's separate statement of facts. E.g., *Ojavan Investors, Inc., supra,* 54 Cal.App.4th 373, 390-391, 62 Cal.Rptr.2d 803, 813; *United Community Church* v. *Garcin*, 231 Cal.App.3d 327, 282 Cal.Rptr.2d 368, 373-5 (1991). Thus, there is no support whatsoever in the summary adjudication record for Landgate's current assertion that it was denied all economically viable use of property.[6]

Second, Landgate contends that the California Supreme Court's decision would cause multiple denials and allow land use agencies to "repeatedly deny development permit applications on illegal, improper or pretextual grounds . . . ." Landgate Pet. at 17. That, of course, was not the case here. The Commission's interpretation of its permit authority, even if erroneous, was neither unreasonable nor a pretext to deny all use, Pet.App. at 24a-25a, 31a, and the Commission promptly approved the development once the jurisdictional issue was resolved. As to Landgate's suggestion that other agencies will be encouraged to abuse the permit process by denying development for "pretextual" reasons, the *Landgate* decision specifically forbids an agency from fabricating a dispute or arbitrarily imposing conditions to discourage

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6. Lechuza's separate statement only declared that "The Court of Appeal found that 'rejecting the lot configuration results in Landgate's being denied any use of its property,'" citing only dicta in the court of appeal's unpublished mandate decision as supporting "evidence." 2 CT 263. The Commission disputed this statement, 3 CT 518, and the trial court did not rely on it in granting summary adjudication on the taking issue. 4 CT 809. Thus, having failed to identify the denial of economically viable use as an undisputed issue of material fact and having failed to provide any supporting evidence, Landgate is barred by California law from arguing that it established that it was denied economically viable use at the time of the motion granting summary adjudication on takings liability. See *North Coast Business Park* v. *Mielsen Construction Co.*, 17 Cal.App.4th 22, 30-32, 21 Cal.Rptr.2d 104, 109-110 (1993).

development. *Id.*[7]

Third, Landgate argues that the California Supreme Court's decision allows inquiry into the public interest and thereby fashions an exception to the categorical taking standard announced in *Lucas*. Landgate Pet. at 27-28. This seriously misinterprets the opinion. The California Supreme Court considered whether the Commission's actions advanced a legitimate public interest in response to the court of appeal's subjective evaluation of the Commission's intent. Pet.App. at 20a-25a. The California Supreme Court found that, from an objective standpoint, the Commission's action was based on legitimate concerns about the project's impacts, and was not formalistic or pretextual. *Id.* As previously discussed, the *Landgate* decision is entirely consistent with *Lucas*. Pet.App. at 26a-29a; see pp. 14-15 *supra*.[8]

Fourth, Landgate criticizes the California Supreme Court's consideration of an agency's bad faith as a "strawman." Landgate Pet. at 6, fn. 6. The California Supreme Court's decision allows a limited inquiry into an agency's motives in

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7. As of the date of this opposition brief, no reported decision has relied on the *Landgate* opinion. Landgate's reference to the California Supreme Court's remand of *Buckley* v. *California Coastal Commission*, 58 Cal.App.4th 460, 68 Cal.Rptr.2d 146, *mod.* 59 Cal.App.4th 39a, __ Cal.Rptr.2d __, *rev. granted*, 72 Cal. Rptr.2d 98, 951 P.2d 841 (1998), *trans'd*, 1998 Cal.LEXIS 4530 (1998), erroneously suggests that the California Supreme Court required the court of appeal to reconsider a finding that the Commission had engaged in a taking. Landgate Pet. at 12. In fact, the court of appeal in *Buckley* previously found that the Commission had *not* engaged in a taking.

8. At least one recent Supreme Court decision has questioned the propriety of using the "substantially advance a legitimate government interest" formulation in evaluating a regulatory taking. See *Eastern Enterprises* v. *Apfel*, __ U.S.__, 118 S.Ct. 2131 (1998) (Kennedy, J., concurring and dissenting). That, however, would not undermine the California Supreme Court's conclusion that the court of appeal's taking analysis unduly focused on the Commission's alleged subjective motivation.

order to *protect* landowners, because an agency may not claim that its action constitutes "normal delay" when in fact the agency's actions are taken in bad faith and in effect constitute a final denial of all use. Pet.App. at 24a-25a, 31a.

Finally, Landgate contends that the Court should accept review because of the alleged hostility of the California courts towards the taking doctrine. Landgate Pet. at 20-21. This attack on the California judiciary does not merit a serious response.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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9. For an independent review of the California Supreme Court's recent decisions, see Uelmen, *Playing Center*, California Lawyer, July 1998 at 45.